SUPREME COURT, U.S.
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No. 133

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

GEORGE H. FULTZ,
Petitioner,

v.

STATE OF OHIO,
Respondent.

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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GEORGE H. FULTZ,

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STATE OF OHIO,

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REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

OPINIONS BELOW

The Brief of the petitioner correctly cites the opinions and judgments below.

JURISDICTIONAL STATEMENT

The petitioner's Petition for a Writ of Certiorari is from a judgment of the Supreme Court of the State of Ohio entered on February 28, 1968. It is the belief of the respondent that the petitioner's conviction under the laws of the State of Ohio was consistent with the Fourth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED

1. Does probable cause to believe that a felony has been or is being committed exist where the information upon which the arresting officer acts is based upon information that he receives on his police radio?

2. When a police officer has information received by way of his police radio broadcast that an arrest warrant has been issued, may such officer lawfully arrest, detain and search a person named in the arrest warrant without having actual physical possession of such warrant?

STATEMENT OF THE CASE

We respectfully submit a Statement of the Case as we believe it to have been shown by testimony as presented at the time of trial. With due respect to counsel for petitioner, we feel that certain important aspects in the Statement of the Case, upon which the lower courts ruled in this matter have, perhaps by inadvertance, been left out.

On April 30, 1966, Chief John Fritz of the Loveland Police Department, at approximately 12:15 P.M., answered a trouble call at a trailer park in Loveland, Ohio. At 12:45 P.M. Chief Fritz transported the prosecuting witness, one Dolly Meece, to the Area Court Clerk's office for the purpose of signing a warrant for Assault & Battery against one George H. Fultz. Some time between 1:50 and 2:45 P.M. on the thirtieth a warrant was signed and issued for the arrest of the petitioner for the crime of Assault & Battery.

At approximately 2:45 P.M. a police radio broadcast was put out that a warrant had been issued for the arrest of the petitioner. Some time prior to 3:00 P.M. a police broadcast was issued that the petitioner, George Fultz, was

armed and had assaulted some people in Loveland, with a gun.

At approximately 3:00 P.M. petitioner, George Fultz, was apprehended by Officer Miller of the State Highway Patrol, and at approximately 3:05 P.M. Patrolman V. Wright of the State Highway Patrol arrived, and in searching petitioner's automobile found the .32 caliber loaded revolver under the front seat of said automobile.

Subsequently, at approximately 5:00 P.M. petitioner was charged by Officer Wright with the crime of carrying concealed weapons.

Petitioner was subsequently indicted, and counsel was appointed to represent him. A Motion to Suppress the Evidence was filed, a hearing was had thereon, and the Motion was overruled. At the time of trial a Motion to Suppress the Evidence was orally made, and a ruling on this Motion was deferred until testimony was given and the evidence offered. Subsequently the Court of Common Pleas of Hamilton County, Ohio, ruled that there was a lawful arrest and a lawful search, and the evidence was admitted. The petitioner was thereupon found guilty of the crime of Carrying Concealed Weapons.

A probation report was requested and obtained by the Court on the petitioner, but sentence of the petitioner was continued, at his request, pending a determination of his appellate proceedings.

The petitioner filed an appeal within time in the Court of Appeals for the First Appellate District of Ohio, and the judgment of the Court of Common Pleas was affirmed without opinion.

He subsequently filed his Notice of Appeal to the Supreme Court of Ohio, for which Leave to Appeal was

granted; a hearing was held and the judgment affirmed, with opinion (Appendix A, page 14). He thereafter filed his Petition for Writ of Certiorari with this Court.

ARGUMENT AGAINST GRANTING THE WRIT

As to petitioner's Questions of Law Nos. 1 and 2, we respectfully submit that his statements in said questions of law are taken out of context of the case and the testimony before this Court.

QUESTION NO. 1

As an example, petitioner says in his Question of Law No. 1 that "the only information or knowledge held by the arresting officer consists of a 'man-wanted' police-radio broadcast". It is submitted, by virtue of the testimony at the trial, that the facts indicate that the police officer knew a lot more than just that a man was wanted.

On page 34 of the Transcript the officer says:

> "I didn't know what he was wanted for, but I knew that a warrant was obtained".

On page 42 the following appears:

> Q. "What felony did you believe was being committed"?
> A. "I believed the man to be armed".
> Q. "And were you able to see the gun at that time that you believed to be armed"?
> A. "No, I did not".

And on page 45 is the following:

> Q. "You know it isn't a felony in this state to be armed, don't you, Mr. Miller"?
> A. "I knew that the man was armed with a gun. That was the knowledge or the information I had".

The following appears on page 46:

> Q. "Right. So all you knew was there was some complaint out about a man with a gun being wanted by Loveland police, isn't that accurate"?
>
> A. *"I also knew he had assaulted some people* there in Loveland with the gun and that was the message".

There are other places in the Transcript which indicate additional points of information that were known by the arresting officer at the time of the arrest in question. It is clearly seen that counsel's statement that the only information that the officer had was that there was a man-wanted police radio broadcast is clearly not sustained by the evidence as brought forth at the time of the trial.

We would like to point out that the courts have long considered that information based upon a request of other police agencies is more than just ordinary hear-say evidence. In the case of *Johnson* v. *Reedy*, 163 O.S. 347, Syllabus 2, it is said:

> "Where a police officer makes an arrest without a warrant at the request of another police agency, all reasonable doubts concerning the reasonableness of the information on which the arresting officer acts should be resolved in his favor".

We would also like to point out that in the case cited by defense counsel, namely, *Dixon* v. *Maxwell*, 177 O.S. 20, at page 21, the Court says:

> "It is the petitioner's contention that, inasmuch as the officers admitted that they did not know that a specific crime was committed and did not even know at the outset which apartment petitioner had gone into, there was no probable cause for the arrest".
>
> "Petitioner unduly restricts the right to arrest. *It is not necessary that an officer know that a specific crime*

has been committed in order for him to have probable cause to make an arrest. It is sufficient if he has reasonable grounds to believe from the circumstances that a felony has been committed, and that the accused has committed it".

It is true that the officer stated at the time of the trial that he could not specifically pinpoint the particular felony which the defendant committed, but that he had reasonable grounds to believe that a felony was committed. As he testified, and as has hereinbefore been set forth, he knew:

1. The man was armed.
2. He had assaulted some people in the City of Loveland.
3. When he first approached the man he did not see the gun in question.

Clearly the evidence adduced in this case would give the officer reasonable and proper cause to believe, from all the surrounding circumstances, that a felony had been committed, and that the accused in question had committed it.

In addition, we submit to the Court that in the case of *State* v. *Ball,* 30 O.O. (2d) 304, 1 O.A. 297, the third Syllabus says as follows:

> "Reasonable cause for the arrest of a person by police officers without a warrant exists where such officers acted on information furnished by the police department of another city, and the defendant fails to show by evidence that the arresting officers had no reasonable cause to believe that a felony had been committed."

In the case before the Court the police officer was acting on a police broadcast. Under the circumstances it cer-

tainly should be given the same weight, if not greater weight, than information furnished by a separate and distinct police agency, as indicated in the above mentioned case.

We also refer for the Court's consideration in this matter the case of *Porello* v. *State,* 121 O.S. 280, which case also involves the carrying concealed weapons charge. In *Syllabus 1* of that case, the Court says:

> "A police officer of a municipality is authorized without a warrant to arrest a person found on the public streets of the corporation carrying concealed weapons in violation of Section 12819, General Code, although such police officer has no previous personal knowledge of the fact, if he acts bona fide and upon information as induces an honest belief that the person arrested is in the act of violating the law".

It might be further pointed out that this case involved a search of an automobile, in which the Court, in the *4th Syllabus,* held that the automobile was in the immediate vicinity or proximity of the defendant in that case.

It is also stated in the *Porello* case at page 285:

> "This is not a case involving a search of a dwelling house. Here we have a search made of a person and of an automobile, under circumstances in which the police officers acted bona fide and upon information which induced in them an honest belief that the person arrested was in the act of violating the law. Paralysis of the police system would result if duly authorized officers were compelled minutely to verify their suspicions prior to acting upon honest belief in search and arrest under such circumstances."

It is to be pointed out that on page 32 of the Bill of Exceptions the police officer who made the initial arrest indicated that he believed that a felony had been committed.

Quoting from the case cited by defense counsel of *Brinegar* v. *United States*, 69 S. Ct. 132, 338 U.S. 160, *Syllabi 8, 9 and 10:*

"Syl. 8. Probable cause for search without warrant is reasonable ground for belief of guilt, which means less than evidence which would justify conviction".

"Syl. 9. Probable cause for search without a warrant means more than a bare suspicion and exists where the facts and circumstances within knowledge of the officers and of which they had reasonable and trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed".

"Syl. 10. Because many situations which confront officers in course of execution of their duties are more or less ambiguous, room must be allowed for some mistakes on their part in determining whether probable cause for search without warrant exists, but mistakes must be those of reasonable men acting on facts leading sensible to their conclusions of probability".

In the case of *Draper* v. *United States*, as reported in 358 U.S. 307, and 79 S. Ct. 329, the Court held in *Syllabi 6 and 7 that*:

"Syl. 6. In dealing with probable cause for making an arrest, courts deal with probabilities, and they are not technical but are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act".

> "Syl. 7. Probable cause for an arrest where the facts and circumstances within an arresting officer's knowledge and of which he had reasonable and trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed".

In light of the case law, it would definitely appear that the police officer in the within case had reasonable and probable cause to believe that a felony had been committed, by virtue of information that he had received from a police radio broadcast, which is one of the basic fundamentals of law enforcement work in our modern society.

QUESTION NO. 2

As to the second question of law we would like to point out that the statement "who does not have physical possession of either a search or an arrest warrant" begs one of the issues. It is the contention of the respondent that the officer in question, as will hereinafter be set forth, when arresting a person on a misdemeanor, does not have to have the physical possession of the warrant in question. We would concur in petitioner's statement that the constitutional validity of the search depends upon the constitutional validity of the arrest.

We would like to point out that the Transcript indicates that the police officer arrived at Loveland, Ohio, according to the testimony, at approximately 12:15 P.M. and 12:45 P.M., and they subsequently arrived at the Clerk of Courts in Lockland, Ohio, at approximately 1:50 P.M., and they left the Lockland Police Department, after obtaining a warrant for the arrest of the petitioner, at approximately 2:45 P.M. This information is set forth in the Transcript

on pages 12 and 13. It is to be further pointed out that the arrest in question occurred at approximately 3:00 P.M. (R. 36).

In the trial, the attesting officer stated:

> "Well, he was wanted by the Loveland Police Department".
>
> The Court: "For what"?
>
> "I didn't know what he was wanted for, but I knew that a warrant was obtained".

And on page 38:

> Q. "You informed him why you stopped him; that Chief Fritz was going to meet you, and there was a warrant for the arrest of Fultz; is that right"?
>
> A. "Yes".

We would concur with counsel in his generalized statements that the constitutional validity of a search depends upon the constitutional validity of arrest. We also concur with counsel to the effect that, in Ohio, a person may not be arrested for the commission of a misdemeanor offense unless the offense was committed in the presence of the arresting officer, *or*, unless a warrant was first obtained.

However, we believe that counsel's contention that the arresting officer must have physical possession of the misdemeanor warrant is unduly restrictive, and was never contemplated by the Legislature. The citizen is adequately protected by virtue of an order in which a warrant has been previously obtained in the matter. It would seem a mockery of justice if every time a police officer who knew that a person was wanted under a misdemeanor warrant, which was on file at the Clerk's office, or his district, would have to go up to the person and state to him:

"Please stay here until I can run down to the police station to obtain the physical possession of your arrest warrant, so that I may arrest you".

Or, let us suppose that two police officers go to effect an arrest, which is not unusual, upon a warrant which one of them has in his possession. The officer with the warrant goes to the front of the house, while the officer who is with him goes to the rear of the house. The officer with the physical possession of the warrant knocks on the door, whereupon the defendant goes out the back door. If we take counsel's argument in his case, the officer in the rear of the premises, who does not have physical possession of the warrant, would not have the right to arrest the defendant because he did not have physical possession of the warrant.

To sustain counsel's contention in this matter would be placing the final spike into law enforcement officials, who bear the cross of society upon their shoulders.

The statute does not say that the police officer must have the warrant on his person at the time of the arrest. The statute merely states, in the case of a misdemeanor, that the warrant must first be obtained prior to the arrest of a defendant. The possibilities of the requirement of the physical possession of the warrant for a misdemeanor arrest in large communities would hamper law enforcement to such an extent that, in all probability, it would be actually nil, unless the suspect were caught right on the spot by the police officer when a misdemeanor, as such, is involved. It is the belief of the undersigned that this was not the intention of the Legislature and the Court in their previous rulings on this subject.

We researched the question as to whether or not a police officer must have the physical possession of a warrant

charging a misdemeanor. In researching the proposition we were able to come across a federal case, *In re Kosopud, et al.*, 272 F. 330, in which it is stated in *Syllabus* 7:

> "Where warrant of arrest has been issued and instructions to act thereon have been received by the arresting officer, his arrest of the person named in the warrant is not unlawful because the arresting officer, at the time of the arrest, does not have the warrant in his physical possession".

This, in our opinion, specifically, without any question, spells out the law which we believe to be the general law of this case, as well as other cases.

We wish to point out that the police officer in question did not think, suspect, or hope, that a warrant had been issued, but he was informed from a reliable source that such a warrant had been issued, to-wit: a police radio broadcast. We again specifically refer to the officer's statement on page 34 of the Bill of Exceptions, in which he says:

> *"But I knew that a warrant was obtained".* (Emphasis ours)

See also the case of *State of Ohio* v. *Crockett,* 10 O. Misc. 245, which is a Municipal Court of Cincinnati case, in which it is held that a police officer may make a lawful arrest on a misdemeanor charge where a warrant has first been obtained and is on file, even though the police officer himself does not have physical possession of the warrant. This case might be distinguished perhaps by the fact that the warrant is directed to the Chief of Police and all officers in that department are his agents, whereas in the case at bar we have a separate police entity.

However, in modern urban life with the criss-crossing of urban communities, and with the interstate and intra-

state expressways in urban areas, there must be a co-operative operation in law enforcement between various police agencies. It is not unusual or uncommon for a person in an urban community to pass through five or six communities in a ten or fifteen minute time spread.

Can it be said that a person's constitutional rights are violated because of a co-operative spirit existing between police agencies to come to the aid of their fellow agencies in another community by making an arrest on information that a warrant has been issued? In the *State* v. *Terry* opinion recently released by this Court it was said:

> "We deal here with an entire rubric of police conduct — necessarily swift action predicated upon the spot observations of the officer on the beat * * *"

In the current case before this Court, the Supreme Court of the State of Ohio said in 13 O.S. (2d) 79, at pages 80 and 81:

> "Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by modern-day criminals. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information".

CONCLUSION

We can see no compelling reason why this Court should grant the Writ requested. We sincerely believe that the petitioner's arrest, either as a result of a warrant previously issued, or as a result of probable cause to believe that a felony had been committed, was sufficient to constitute a good and valid arrest. In that we have a good and valid arrest, the search and seizure which was incidental to said arrest is valid, and there is no basis for the granting of a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, APPELLEE, v. FULTZ, APPELLANT.

(Cite as State v. Fultz, 13 Ohio St.2d 79)

Arrest without warrant — Probable cause — What constitutes — Information received by officer over police radio.

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1. To have probable cause to arrest without a warrant an officer must have sufficient information from a reason-

ably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. (Section 2935.04, Revised Code, construed and applied.)

2. Where a police officer has received information over the police radio and that information is such as to give the officer reasonable grounds to believe a felony has been committed, such officer has probable cause to make an arrest.

(NO. 41004—Decided February 28, 1968)

Appeal from the Court of Appeals for Hamilton County.

On April 30, 1966, the chief of police of Loveland, Ohio, was summoned to a trailer park in that city. There he met one Dolly Meece who accompanied him to Lockland where she signed an affidavit charging George H. Fultz, appellant herein, with assault and battery, a misdemeanor. A warrant was issued for his arrest.

A call was put out on the police radio for the apprehension of Fultz. From the testimony at the trial it appears that the radio message contained the information that a warrant had been issued for the arrest of Fultz; that he was armed; and that he had assaulted some people with a gun.

Within a short time a state highway patrolman who had heard the radio message stopped Fultz in his car at the intersection of Loveland-Madeira Road and Branch Hill Pike. A second patrolman arrived shortly thereafter and conducted a search of Fultz' car. He found a gun under the front seat.

Subsequently, Fultz was indicted for and found guilty of the crime of carrying a concealed weapon. The judgment of conviction was affirmed by the Court of Appeals

and the cause is now before this Court following allowance of a motion for leave to appeal.

Mr. Melvin G. Rueger, prosecuting attorney, and *Mr. Leonard Kirschner,* for appellee.

Messrs. Morr & Gilday and *Mr. Bernard J. Gilday, Jr.,* for appellant.

MATTHIAS, J. The primary question raised by this appeal is whether an arresting officer may base his belief that a felony has been committed on information received by him from a broadcast over a police radio. It is the appellant's position that such a source of information is not reliable enough to furnish the officer with probable cause to make the arrest.

In disposing of this question it is well to consider the realities of crime and law enforcement in present-day society. To effectively combat crime today, the concerted effort of local, state and federal officers, with their vast network of radio and teletype communication systems, is required. The present-day criminal is a mobile criminal. Because of his use of the motor vehicle and other means of rapid transportation even a slight delay in his apprehension will give him an opportunity to be far removed from the scene of the crime and the person or persons he has injured or exploited. The criminal-at-large is a threat to society; thus, it is the duty of the police to apprehend him at the earliest opportunity not only because of the crime committed but to prevent further depredations by him.

Although possibly not recognized by the average citizen, the prevention of crime is fully as much a part of police duty as the apprehension of the criminal. A forceful deterrent to criminal activity is provided when officers of the law are able to quickly apprehend suspected violators. To

do this they must avail themselves of the best means of alerting fellow officers that the suspect is wanted. The police are entitled to use modern technological advances to cope with the use thereof by the modern-day criminal. The police radio is one of such advances and is the normal and logical method to alert law enforcement officers in surrounding areas that a crime has been committed and a suspect is wanted. Information received on a police broadcast is in the nature of an official communication, and ordinarily it must be considered as a trustworthy source of information.

A police officer necessarily relies on the information he receives over the police radio, and upon the receipt of such information it is the duty of the officer to act and act quickly. And, where the information is such as to give the officer reasonable grounds to believe a felony has been committed, then he has probable cause to make an arrest.

In the instant case, the arresting officer was a state highway patrolman. Section 5503.02, Revised Code, provides in part:

> "* * * The superintendent of the state highway patrol or any patrolman may arrest without a warrant any person, who is the driver of or a passenger in any vehicle operated or standing on a state highway, who he has reasonable cause to believe is guilty of a felony, under the same circumstances and with the same power that any peace officer may make such arrest. * * *"

Furthermore, Section 2935.04, Revised Code, reads as follows:

> "When a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, *any person without a warrant* may arrest another whom he has *reasonable cause to believe* is

guilty of the offense, and detain him until a warrant can be obtained." (Emphasis added).

It is worth noting that, under the terms of this statute, even a private citizen may make an arrest upon reasonably reliable information that a felony has been committed.

For an arrest without a warrant to be constitutionally valid the arresting officer must have probable cause to make it at that time. To have probable cause the officer must have sufficient information derived from a reasonably trustworthy source to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused. *Brinegar* v. *United States,* 338 U.S. 160; *Henry* v. *United States,* 361 U.S. 98, 102; and *Beck* v. *Ohio,* 379 U.S. 89.

The officer in the instant case testified that at the time of the arrest he believed that a felony had been committed by the appellant. The question is: Did he have reasonable ground for such belief? This is a question of fact and is dependent upon the information the officer received from the police radio message.

Unfortunately, the record does not contain a complete statement of what went out over the police radio. However, from the testimony in the record, it is clear that the officer learned from the police radio that appellant had assaulted persons in a trailer court with a gun (a felony under Section 2901.241, Revised Code); that he was armed; and that a warrant had been issued for his arrest. Certainly, with such information in his possession the officer had probable cause to make the arrest. The arrest, therefore, was valid.

Appellant has also questioned the validity of the search of his car which produced the weapon upon which the present conviction for carrying a concealed weapon is based.

The officer had been informed that appellant was armed, and the search, made by a second officer arriving a few minutes later, was conducted as an incident of the arrest. It is now well settled that a search of a motor vehicle incident to a valid arrest is a valid search. *Brinegar* v. *United States, supra* (388 U.S. 160). See *Dixon* v. *Maxwell,* 177 Ohio St. 20; *Draper* v. *United States,* 358 U.S. 307; *Harris* v. *United States,* 331 U.S. 145; and *United States* v. *Rabinowitz,* 339 U.S. 56.

Having determined that the arrest in the present case was valid, we conclude that the search was also valid.

There being no error prejudicial to appellant, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

TAFT, C. J., ZIMMERMAN, O'NEILL, HERBERT and BROWN, JJ., concur.